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## EX PARTE PRESENTATION

December 24, 1997

Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street N.W. Room 222  
Washington, DC 20554

Re: Implementation of the Telecommunications Act of 1996:  
Telecommunications Carriers' Use of Customer Proprietary  
Network Information and Other Customer Information  
(CC Docket No. 96-115)

Dear Ms. Salas:

SBC Communications Inc. ("SBC") files this letter to reemphasize certain legal and regulatory principles firmly rooted in Section 222 of the Communications Act. Unfortunately, these principles were either incorrectly stated or ignored by representatives of the California Cable Television Association ("CCTA") in its letter reflecting its having met with the Policy and Program Planning Division of the Common Carrier Bureau.<sup>1</sup> SBC thus also addresses those of CCTA's suggestions that are relevant to the CPNI rulemaking proceedings.

### **Section 222 and any regulations interpreting it must be applied to all telecommunications carriers.**

Section 222(a) imposes a general duty on "every" telecommunications carrier to protect the confidentiality of proprietary information, and Section 222(c)(1) imposes specific CPNI duties on "a telecommunications carrier that receives or obtains customer proprietary network information...." Consistent with Congress' words, and with consumers' legitimate expectations of privacy, these duties do not vary depending upon whether the carrier in question may be a LEC, ILEC, IXC or mobile service provider.<sup>2</sup>

<sup>1</sup>Letter of Donna Lampert to William F. Caton, Acting Secretary, dated September 12, 1997 (hereinafter "CCTA letter").

<sup>2</sup>SBC Comments filed June 11, 1996 ("SBC Comments"), at 2-5; SBC Reply Comments, filed June 26, 1996 ("SBC Reply"), at 1-5; Letter of Todd Silbergeld to William F. Caton, Acting Secretary, dated March 12, 1997 ("SBC Letter"), Attachment A hereto, at 1.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

As one commentor succinctly observed: “[T]he privacy of all consumers is protected under the terms of Section 222 and the privacy of all consumers is equally deserving of protection regardless as to which telecommunications carriers serve them.”<sup>3</sup>

CCTA suggests that Section 222 reflects particular Congressional concern about the potential for anticompetitive conduct by the ILECs. This suggestion is devoid of merit. It finds no support in the language of the statute, in consumers’ privacy expectations, or elsewhere. CCTA’s letter does not cite any particular conduct, much less demonstrate how such conduct might be relevant to the legitimate use of CPNI by ILECs.

**A carrier’s simple, clear and accurate communication with its customers, designed to determine their CPNI-related wishes, is allowed by Section 222(c)(1), whether such communication is initiated orally or by means of an opt-out writing.**

Where a customer has an existing business relationship with a carrier, a wide variety of acceptable forms of customer approval is appropriate, including approval extended orally or as a result of an opt-out process initiated by a carrier’s written notification. Section 222(c)(1) does not preclude carriers from utilizing any of these means to determine their own customers’ CPNI-related wishes. Indeed, customers typically expect their current carrier and its affiliated companies to use CPNI to market, provision, and provide customer care across a range of products and services.<sup>4</sup>

Each carrier should ensure that, regardless of whether its communication with its customers is oral or written, any description of CPNI-related rights should be simple, clear and accurate. However, there is no reasonable basis to suggest, as did CCTA, that the mere use of telephone contacts, opt-out notifications, or reward program-related letters “may not be clear to the customer what he or she is agreeing to permit” or that they are anticompetitive and deceptive.<sup>5</sup> CCTA’s letter does not provide any factual support for its views or any concrete examples that it may have provided the Commission’s Staff.

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<sup>3</sup>Comments of the Pennsylvania Office of the Attorney General, Office of Consumer Advocate, filed June 11, 1996, at 5.

<sup>4</sup>Letter of Todd Silbergeld to William F. Caton, Acting Secretary, dated June 6, 1997, attachment submitted on behalf of the BOC Coalition, at 4.

<sup>5</sup>One can only presume that CCTA would also find anticompetitive and deceptive the Commission’s own pre-Act CPNI rules. Under these rules, BOCs were generally required to send multi-line business customers annual CPNI notices regarding the use of CPNI to market CPE and enhanced services. Yet, the Commission’s “prior authorization rule” applied only to CPNI used to market enhanced services and only to those businesses having more than twenty lines. In other instances, no written authorization from the customer was required. Waiver from Customer Proprietary Network Information Notification Requirements, CCB Pol 97-13, Order, DA 97-2599, released December 16, 1997, at para. 3; Computer III Remand Proceedings; Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571 (1991) (further history omitted), at para. 89.

**A BOC's use of CPNI to support joint marketing and sales for a Section 272 affiliate, or its disclosing CPNI to a Section 272 or other affiliate for such a purpose, are activities within Section 272(g)(3), and not Sections 272(c)(1) or (b)(5).**

CCTA's letter claims that CPNI is fully subject to nondiscrimination requirements, including Section 272(c)(1) and Section 272(b)(5), and that if an affiliate of an ILEC obtains CPNI to market non-local services, all other similarly situated independent entities can obtain the information in the same manner. CCTA is wrong on both points.<sup>6</sup>

CPNI is inextricably intertwined with, if not a direct part of, effective joint marketing. The Commission itself has noted the usefulness of CPNI in identifying and marketing to potential customers.<sup>7</sup> Perhaps more importantly, the Commission has acknowledged that two affiliated companies' "joint marketing ... necessarily involves sharing of some customer network information" between them.<sup>8</sup> As such, CPNI fits comfortably within the terms of Section 272(g)(3), which excepts the joint marketing and sale of interLATA services from the nondiscrimination provisions of Section 272(c)(1). More particularly, where a BOC has determined its customers' CPNI-related wishes, and subsequently discloses CPNI of non-restricted accounts<sup>9</sup> to its Section 272 affiliate for that affiliate's joint marketing of local and long distance services, Section 272(c)(1) has no application; so too, Section 272(c)(1) has no application where a BOC uses CPNI (or discloses it to a non-Section 272 affiliate) to jointly market local and long distance services. As a consequence, the use and disclosure of, and access to, CPNI in such instances is exempt from the nondiscrimination obligations of Section 272(c)(1).

Even if a Section 272(c)(1) obligation were applicable in instances such as those identified above, Section 272 does not address the customer authorization required before CPNI must be provided to an unrelated third party. Instead, Section 222 alone controls as to whether, and in what circumstances, CPNI must be provided to such third parties. For several reasons related to Section 222, as well as prudent privacy and telecommunications policy, such authorization should be written.<sup>10</sup>

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<sup>6</sup>CCTA is also wrong as to the applicability of Section 272 in the first instance: the statute is not applicable to all ILECs.

<sup>7</sup>Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 3 FCC Rcd 1150 (1988), at para. 97.

<sup>8</sup>BankAmerica Corporation v. AT&T, 8 FCC Rcd 8782 (1993), at para. 27 (emphasis added).

<sup>9</sup>This letter assumes arguendo, and for present purposes only, that local exchange services and interLATA services constitute two separate CPNI buckets.

<sup>10</sup>More detailed points, particularly regarding statutory construction, are attached hereto (Attachment B).

Regarding Section 272(b)(5), a BOC's notification to a customer provided within an opt-out process meant to determine that customer's CPNI-related wishes, is not a "transaction" between the BOC and its Section 272 affiliate.<sup>11</sup> Instead, the notification and overall process is speech between the carrier and its customers which communicates the customers' CPNI-related rights.

**The Alternate Draft Order of the CPUC's Commissioner Duque Reflects a More Reasonable and Appropriate View of the Legitimate Use of CPNI.**

CCTA's letter refers to the May, 1997, draft decision of an administrative law judge in the Pacific Bell Communications case pending before the California Public Utilities Commission ("CPUC") which addresses CPNI issues. However, it neglects to mention the July, 1997, alternative draft decision of the CPUC's Commissioner Duque, though this draft was prepared over two months before CCTA's letter to the Commission. The alternative draft decision is more reasonable and balanced in its allowance of the use of CPNI in connection with joint marketing local and long distance services, the pertinent portion of which is attached hereto (Attachment C). The CPUC has deferred a decision on the Pacific Bell Communications case until the FCC issues an Order in CC Docket 96-115.

**The Commission is in a far better position than CCTA to determine the accuracy and reliability of the Pacific Bell survey submitted on December 11, 1996.**

CCTA's letter claims that this study is flawed and entitled to no weight. Commission representatives met with Professor Westin, the study's advisor, and questioned him at length to understand how the study was structured and why the results may be regarded as accurate and reliable. CCTA's self-serving statements about California consumers' privacy expectations are not supported by the input of Byron Williams and Jess Haro, spokespersons for California consumer groups who met with the Commission staff on February 20, 1997.

SBC agrees that Californians desire that their privacy rights be respected. However, Californians also share certain key attributes of consumers located elsewhere -- they want to hear about new services and offers from their current telephone company that may be of great benefit to them, and they do not consider telephone company use of CPNI to these ends as adversely affecting their privacy. In this regard, the Commission is far better positioned to assess the input of Professor Westin and the California consumers who talked with Staff.

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<sup>11</sup>Comments of SBC regarding FNPRM, Question 10, filed March 17, 1997.

**The Commission must respect applicable Constitutional principles while seeking to interpret and implement Section 222.**

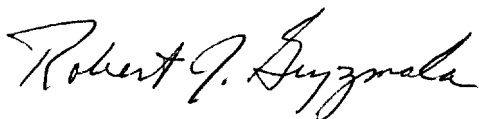
CCTA appears to have criticized the contributions to this docket made by Professor Laurence Tribe, and the supportive points and authorities he provided the Commission. This criticism is unjustified and unwarranted, particularly without CCTA's having submitted contrary points and authorities, so that the worth of its own criticism can be put to the test.

Professor Tribe's submissions support the right of any company or carrier to use the commercial information it holds in a true and fair manner. Moreover, businesses other than telecommunications carriers have long held and used commercial information in entirely appropriate ways and have not been found guilty of anticompetitive practices merely because of that use. CCTA and others simply do not want local exchange carriers to use their local service CPNI to compete in new markets. But that use, as well as the use of long distance information to compete in local markets, is a customer decision and not a regulatory decision under Section 222. As Professor Tribe also correctly explained, LECs also hold the same right as other companies to "speak" to their customers for themselves without also having to speak to them for unrelated companies. To the extent CCTA disagrees with these fundamental points, it should specifically state the basis for that disagreement. Its letter does not do so.

In closing, SBC appreciates the opportunity to clarify these several important points. We trust that the Commission will decide these matters on the basis of the record developed, not on the speculative and tired incantations of those who would elevate their own competitive interests over consumers' legitimate expectations of privacy and Congress' will as stated in Section 222.

Pursuant to the Section 1.1206(a)(1) of the Commission's Rules, two copies of this letter and the written documentation are attached for inclusion in the public record in the above-captioned proceeding.

Sincerely,

Handwritten signature of Robert J. Gygis in cursive script.

Attachments

CC: Ruth Milkman  
Dorothy Attwood  
Lisa Choi  
Tanya Rutherford  
Blaise Scinto  
Raelynn Tibayan Remy



March 12, 1997

**EX PARTE**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: *In the Matter of Implementation of the Telecommunications Act of 1996:  
Telecommunications Carriers' Use of Customer Proprietary Network  
Information and Other Customer Information, CC Docket No. 96-115*

Dear Mr. Caton:

In accordance with the Commission's Rules governing *ex parte* presentations, please be advised that yesterday Virginia Vann, Tim Leahy, Bob Gryzmala, and the undersigned, representing SBC Communications Inc. and Southwestern Bell Telephone Company (SWBT), met with Richard Metzger and Paul Gallant of the Common Carrier Bureau. The purpose of the meeting was to discuss SWBT's position in the above-referenced rule making docket.

The attached materials served as a basis and outline for our discussion. Pursuant to Section 1.1206(a)(1) of the Commission's Rules, 47 C.F.R. § 1.1206(a)(1), two copies of this notification and the materials are provided for your use. Due to unavoidable circumstances, we were unable to file this notification with your office yesterday. We apologize for any inconvenience this may cause. Should you have any questions concerning the foregoing, do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Todd F. Silbergeld", written in a cursive style.

Attachment

cc: Mr. Metzger  
Mr. Gallant

**ANY RULES IMPLEMENTING SECTION 222(c)(1) MUST APPLY EQUALLY  
TO ALL TELECOMMUNICATIONS CARRIERS.**

Congress directed that CPNI privacy requirements apply to “a telecommunications carrier that receives or obtains [CPNI].” Section 222(c)(1).

A “telecommunications carrier” is “any provider of telecommunications services” except telecommunications service aggregators. Section 153(44).

Elsewhere, Congress indicated its intent that the CPNI privacy requirements apply to all telecommunications carriers:

- The title of Section 222(c)(1) is unqualified: “Privacy Requirements For Telecommunications Carriers.”
- The duty is unqualified: “Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to . . . customers.” Section 222(a) (emphasis added).
- When Congress intended to obligate fewer than all carriers, it did so. For example, Subscriber List Information obligations attach only to a telecommunications carrier “that provides telephone exchange service,” Section 222(e), and use by a “local exchange carrier” of aggregate customer information for purposes other than those described in subsection (c)(1) is limited. Section 222(c)(3). No such qualifying language appears in Section 222(c)(1)’s mandatory privacy requirements.

Consumers’ legitimate privacy expectations support the application of Section 222(c)(1) to all telecommunications carriers. As the Pennsylvania Office of the Attorney General, Office of Consumer Advocate (“PaOCA”) correctly observed, “[t]here is no reason to believe that the privacy of consumers served by some telecommunications carriers are deserving of protection more than others. The PaOCA submits that the privacy of all consumers is protected under the terms of Section 222 and the privacy of all consumers is equally deserving of protection regardless as to which telecommunications carriers serve them.” Comments at 5.

The Commission’s pre-Telecommunications Act CPNI rules, which apply only to particular telecommunications carriers, are in direct conflict with the requirements of Section 222(c)(1) of the Act, which apply to all telecommunications carriers. That conflict cannot be reconciled. Therefore, the rules must yield to the Act.

**SECTION 222(c)(1) SHOULD BE INTERPRETED TO PERMIT A  
TELECOMMUNICATIONS CARRIER TO USE CPNI TO MARKET AND PROVIDE  
VARIOUS SERVICE OFFERINGS COMPRISING AN INTEGRATED  
TELECOMMUNICATIONS SERVICE PACKAGE.**

“Traditional” service distinctions are being out paced by technology-driven advancements.

As one commentor noted, such distinctions “are becoming blurred by new service offerings comprising elements of several previously distinct categories.” (CompTel Comments at p. 5)

**A TWO-STEP APPROVAL PROCESS – ONE-TIME NOTIFICATION PLUS A RIGHT TO CONTACT THE CARRIER SHOULD A CUSTOMER ELECT TO RESTRICT CPNI USE – WOULD BE EFFECTIVE AND EASY TO ADMINISTER.**

*Step One.* A one-time bill message or bill insert in which the telecommunications carrier simply and succinctly provides the following information:

- the customer's CPNI rights
- the CPNI use contemplated by the carrier for which approval is required
- the customer's right to restrict such use
- the means by which the customer may restrict such use (either orally or in writing) that the CPNI use contemplated by the carrier will be permitted absent restriction

*Step Two.* Either of the following:

- the customer requests CPNI restriction
- the customer does not request CPNI restriction

The foregoing process would fully accommodate customers' CPNI rights without requiring carriers to implement overly burdensome or detailed procedures. The process would also be consistent with the customer expectations indicated by the results of the National Opinion Survey conducted by Opinion Research Corporation and Professor Alan F. Westin, filed with the Commission on December 11, 1996 by Pacific Telesis. Among the survey's findings were:

- Large majorities of respondents said that they would be interested in learning about new services from their local telephone company. (Finding No. 7).
- Large majorities also say that it is acceptable for their local telephone company to look up their records and offer them additional services, and offering an opt out increases this majority to 82 percent.

These results are consistent with the lack of complaints made to Southwestern Bell Telephone Company about CPNI. A recent sample of total complaints received in 1996 reflects that less than 2 percent (i.e., 326) had to do with telemarketing, and only one of 35 from this sample dealt specifically with the use of CPNI.

**A BOC'S USE OF CPNI TO SUPPORT JOINT MARKETING AND SALES FOR A SECTION 272 AFFILIATE, OR ITS PROVIDING CPNI TO AN AFFILIATE FOR SUCH A PURPOSE, ARE ACTIVITIES WITHIN SECTION 272(g)(3).**

After a BOC receives interLATA authorization under Section 271, it "will be permitted to engage in the same kind of marketing activities as other service providers." Order, CC Docket No. 96-149, FCC 96-489, released December 24, 1996 ("Order") at para. 291.

Section 272(g)(3) excepts "joint marketing and sale" of interLATA services from the nondiscrimination requirements of Section 272(c)(1).

Section 272(c)(1) imposes a nondiscrimination requirement upon a BOC which provides "information" to its Section 272 affiliate. Order, para. 218.

The term "information" includes CPNI. Id., at para. 222.

CPNI is integral to the following activities within Section 272(g)(3):

- The BOC jointly markets local and long distance services.
- The BOC's Section 272 affiliate jointly markets local and long distance services.
- The BOC's non-Section 272 affiliate jointly markets local and long distance services.

Section 272(g)(3) and Commission precedent contemplate that the BOC and its affiliates can share or use CPNI on an exclusive basis in support of the following specific joint marketing activities:

- to respond to customer inquiries - Order, para. 296.
- to perform sales functions - Id.
- to process orders for services requested - Id.
- other activities on a case-by-case basis - Id.
- to "identify potential customers . . . and formulate proposals to those customers" - Phase II Supplemental NPRM, CC Docket No. 85-229, FCC 86-253, released June 16, 1986, para. 55.
- to "identify certain customers whose telecommunications needs are not being met effectively and to market an appropriate package of enhanced and basic services to such customers" - Phase II Recon. Order, 3 FCC Rcd 1150 (1988), para. 97.

Thus, a BOC's use of CPNI to support joint marketing and sales, or its providing CPNI to an affiliate for such a purpose, are activities permitted to be done within Section 272(g)(3) on an exclusive basis.

ATTACHMENT B

- I. **Section 222(c)(1), entitled “Privacy Requirements for Telecommunications Carriers” is limited to addressing customers’ CPNI-related privacy expectations in CPNI developed between a customer and the serving carrier. Section 222(c)(1) does not require disclosure of CPNI by the serving carrier to a third party as a condition to the carrier’s use of or access to CPNI, or its disclosure of CPNI to an affiliate.**
- Section 222(c)(1) establishes the governing privacy requirements where CPNI is employed “in its provision” of services (emphasis added). CPNI received or obtained by a carrier by virtue of providing telecommunications service may be used, or disclosed, without customer approval, in its provision of subparagraph (A) or (B) services. With customer approval, such CPNI may be accessed, used or disclosed by the carrier in connection with services that do not constitute subparagraph (A) or (B) services.
  - Nothing in the language of Section 222(c)(1) requires the carrier to disclose CPNI to a third party as a condition to its acting in accordance with customer approval allowing the carrier to use or access CPNI or to disclose it to an affiliate.
  - As noted below, Congress imposed conditional disclosure obligations in connection with Aggregate Customer Information and Subscriber List Information. It did not impose any such obligations within Subsection (c)(1) in connection with CPNI. Under the principle of “expressio unius est exclusio alterius,” it must be concluded that Congress did not intend for subsection (c)(1) to impose any obligation upon carriers to disclose CPNI to a third party, conditional or otherwise.
- II. **Only Section 222(c)(2), entitled “Disclosure On Request by Customers,” specifically addresses potential disclosure of CPNI to third parties; this section alone controls whether, and under what circumstances, CPNI may be disclosed to third parties.**
- Although Section 222 is generally devoted to, and entitled, “Confidentiality of Customer Proprietary Network Information,” only subsection (c)(2) is specifically devoted to the disclosure of CPNI to a third party designated by the customer.
  - Under traditional canons of statutory construction, “the specific governs the general.”
  - Thus, the issue of required disclosure of CPNI to a third party turns on an interpretation of Section 222(c)(2).

**III. To require a carrier to disclose CPNI to a third party without the customer's "affirmative written request" would render Section 222(c)(2) meaningless and would negate the privacy protections afforded customers by Section 222(c)(1).**

- Subsection (c)(2) provides that a telecommunications carrier "shall disclose [CPNI], upon affirmative written request by the customer, to any person designated by the customer." This subsection should be interpreted as requiring disclosure to a third party "only" upon a customer's affirmative written request.
- A contrary reading would render subsection (c)(2) superfluous, if not completely meaningless, a result that should be avoided under traditional rules of statutory construction. First, it would read the emphatic words "affirmative written" (preceding "request") out of the statute, or at a minimum, strip them of any meaning. Second, there would be no need for subsection (c)(2) in that there would never be a need for a law requiring a carrier to disclose CPNI upon an affirmative written request if the carrier was obliged to disclose CPNI without an affirmative writing. Third, to the extent that such a disclosure obligation might be held to apply where the serving carrier were to use the CPNI or disclose it to its affiliates in accordance with subsection (c)(1), it would erect a condition on the carrier's use or disclosure that is not required or authorized by subsection (c)(1).
- Allowing a third party to require disclosure to it of CPNI absent a customer's writing would dilute the customer's privacy requirements. The third party recipient asserting customer consent to receive CPNI may be any one or all of hundreds of telecommunications carriers, and indeed, may be among the thousands of non-telecommunications businesses; subsection (c)(2) does not distinguish between third parties who are telecommunications carriers and those who are not. None of the latter would be subject to the requirements of Section 222, or perhaps even the Commission's jurisdiction in the first instance.

**IV. In every other instance under Section 222 in which Congress required disclosure of customer information to third parties, it attached a condition precedent to such disclosure. Reading Section 222 as a whole, the "affirmative written request" language of Section 222(c)(2) should likewise be regarded as a condition precedent to requiring disclosure of CPNI to a third party.**

- Aggregate Customer Information - Under Section 222(c)(3), a local exchange carrier must provide aggregate customer information to third parties on reasonable and nondiscriminatory terms and conditions if:
  - the carrier uses, discloses or permits access to such information other than for the purpose described in Section 222(c)(1); and

-- the third party makes a “reasonable request” for such information.

- Subscriber List Information - Under Section 222(e), a telephone exchange service carrier must provide subscriber list information to third parties, under nondiscriminatory and reasonable rates, terms, and conditions if:

-- the third party makes a “request” for such information; and

-- the third party’s request is “for the purpose of publishing directories in any format.”

- Individually Identifiable Customer Proprietary Network Information - Section 222(c)(1) contains no language that requires disclosure of CPNI to a third party. Only Section 222(c)(2) requires disclosures of CPNI to a third party; such disclosure is required “upon affirmative written request by the customer.”

-- Consistent with Congress’ attachment of conditions precedent to the required disclosure of Aggregate Customer Information in Section 222(c)(3) and Subscriber List Information in Section 222(e), it is reasonable to conclude that Congress likewise intended to state a condition precedent (i.e., the customer’s “affirmative written request”) to required disclosure of CPNI by a carrier to a third party.

-- Were Section 222(c)(2) interpreted as not stating a condition precedent, it would necessarily follow that Congress must have intended to impose an unqualified duty to disclose CPNI to third parties, but not Aggregate Customer Information or Subscriber List Information.

-- Congress could not have intended less confidentiality protections for CPNI than for Aggregate Customer Information or Subscriber List Information, much less no confidentiality protections.

-- Under traditional canons of statutory construction, when interpreting a portion of a statute, the statute should be read as a whole. In this instance, reading the statute as a whole compels the conclusion that the “affirmative written request” requirement of Section 222(c)(2) should be read as a condition precedent to a carrier’s disclosure of CPNI to a third party.

COM/HMD/max

H-9a  
ALTERNATE DRAFT (WFW7.0)  
7/16/97

Decision ALTERNATE ORDER OF COMMISSIONER DUQUE

(Mailed July 1, 1997)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Pacific Bell Communications for a  
Certificate of Public Convenience and Necessity to  
Provide InterLATA, IntraLATA and Local Exchange  
Telecommunications Services Within the State of  
California.

Application 96-03-007  
(Filed March 5, 1996)

(See Attachment D for list of appearances.)

distance market. At the same time, we recognize that PB Com is dealing with uncertainty about its market entry, and that many of the plans it had developed in late 1996 were contingent on FCC orders that had not yet been issued.

We believe that ORA's recommendations strike a reasonable balance in dealing with this issue. Our order today requires that the propriety, cost and industry availability of any network services provided by Pacific Bell to PB Com be considered in an audit of PB Com. Additionally, our order prohibits PB Com from accepting network services from Pacific Bell that are not available to all telecommunications providers on a non-discriminatory basis. Presumably, these requirements will be of little moment if the current FCC prohibitions continue to apply. If the FCC prohibitions change, these requirements will help assure PB Com's compliance with the antidiscrimination provisions of the Costa Bill.

#### 16. Joint Marketing

The FCC's order on Non-Accounting Safeguards permits a Bell operating company like Pacific Bell to market its affiliate's long distance service on all inbound calls, provided that the Bell operating company also informs new customers of their right to select the long distance carrier of their choice.<sup>32</sup>

The FCC reasoned that the ability of Pacific Bell to market PB Com services on inbound calls from customers was part of the balance struck by Congress. The Telecommunications Act "opens local markets to competing providers by imposing new interconnection and unbundling obligations" on Pacific Bell.<sup>33</sup> In exchange, the Act permits Pacific Bell to provide long distance service once the competitive checklist is satisfied; but because the local market will not be immediately competitive, Congress

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<sup>32</sup> FCC Order 96-489, ¶ 292. ("Specifically, the BOCs must provide any customer who orders new local exchange service with the names and, if requested, the telephone numbers of all of the carriers offering interexchange services in its service area....As part of this requirement, a BOC must ensure that the names of the interexchange carriers are provided in random order.") (Footnotes omitted.)

<sup>33</sup> Id. ¶ 8.

requires that, for a period of at least three years, Pacific Bell's long distance service must be provided by a separate affiliate.<sup>34</sup> The FCC surmises that this separate affiliate requirement prevents Pacific Bell from gaining all of the economies of scope of vertical integration, with the exception permitted by the 1996 Telecommunications Act that Pacific Bell can jointly market the long distance service of its affiliate.<sup>35</sup>

The FCC noted that when AT&T, MCI or Sprint resell Pacific Bell's local service, they are prohibited from offering one-stop shopping until Pacific Bell's affiliate, PB Com, has in-region interLATA authority.<sup>36</sup> The FCC commented that the limitation prohibiting one-stop shopping until Pacific Bell through its affiliate enters the long distance market reflects the intent of Congress to "provide parity between the Bell operating companies and other telecommunications carriers in their ability to offer 'one-stop shopping' for telecommunications services."<sup>37</sup>

We are guided by the FCC's interpretation of the Telecommunications Act. Additionally, however, in authorizing the long distance authority sought by PB Com, we are governed by the mandates of the California Legislature. Specifically, in considering the matter of Pacific Bell's joint marketing of PB Com services, we are required by the Costa Bill (PU Code § 709.2(c)) to determine:

"that there is no anticompetitive behavior by the local exchange telephone corporation, including unfair use of subscriber information or unfair use of customer contacts generated by the local exchange telephone corporation's provision of local exchange telephone service," and

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<sup>34</sup> Id. ¶ 9.

<sup>35</sup> 41 U.S.C. § 272(g)(2) and (3).

<sup>36</sup> FCC Order 96-489, ¶ 277.

<sup>37</sup> Id. ¶ 277.

"that there is no substantial possibility of harm to the competitive intrastate interexchange telecommunications markets." (PU Code § 709.2(c)(2) and (c)(3).)

A Pacific Bell witness testified that customer service representatives will make certain that new customers (defined as those seeking initial phone service or phone service at another location<sup>33</sup>) are informed that they have options for long distance service, and that Pacific Bell will continue to comply with the nondiscrimination requirements of the Telecommunications Act and the Costa Bill. He and PB Com witnesses testified that joint marketing activities will be conducted fairly, and that further restrictions are unnecessary.

The evidence at hearing, however, shows that Pacific Bell intends to use its monopoly power in the local exchange market to maximum advantage in garnering business for PB Com. Internal Pacific Telesis documents disclosed at hearing show that Pacific Bell has many millions of incoming customer calls per year.<sup>34</sup> The evidence shows that the Telesis companies expect to attract 50% to 60% of PB Com's new customers through Pacific Bell contacts. Pacific Bell representatives will be expected to try to sell PB Com services on virtually all incoming calls, including those in which callers say that they have decided on AT&T, MCI or Sprint, for example, as their long distance carrier and simply wish to place a change order.<sup>35</sup>

Draft marketing scripts show that Pacific Bell representatives will state that while numerous companies offer long distance service, the representative can immediately explain and sign up the caller for the long distance service offered by a Pacific Bell

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<sup>33</sup> "A customer orders 'new service' when the customer either receives service from the BOC for the first time, or moves to another location within the BOC's in-region territory." FCC Order 96-489, ¶ 292.

<sup>34</sup> The precise number, received into evidence under seal, is set forth in Ex. C-21.

<sup>35</sup> Evidence of specific marketing plans, much of it speculative in view of then-pending federal and state regulations, was received under seal in a number of exhibits, including Ex. C-13, C-22 and C-20.

subsidiary. The scripts are obviously designed to focus the attention of customers on only one long distance carrier, PB Com.

Additionally, the evidence shows that Pacific Bell representatives will be expected to seek the permission of callers to use their proprietary records for the purpose of marketing PB Com services. TURN introduced a discovery response from PB Com showing two sample questions that Pacific Bell representatives may use to request customer authorization to use CPNI:

"The first question could be used in general discussions with customers:

'I'd like to talk to you about products that would be of use to you offered through PacBell Bell affiliates. May I access your records to do so?'

"This second question could be used when a customer calls PacBell to establish local exchange service-

'May I refer to the information you just gave me to discuss other services offered through PacBell Bell affiliates that may help you?'

(Ex. 28; see also sealed exhibit C-14.)

Reviewing Pacific Bell's joint marketing plans, TURN witness Costa testified:

"This situation would give PacBell Com a huge advantage over its competitors. PacBell is the state's largest local exchange telephone company and serves the vast majority of customers. Under PacBell Com's plan, virtually every customer who contacted PacBell service representatives regarding any customer service question could be steered to PacBell Com. Customers desiring information about [interexchange carrier] services would be told they could only obtain information about PacBell Com services and they would have to make additional telephone calls to find out about services from other companies." (Ex. 99 at 7.)

PB Com witnesses justified the company's plans for aggressive sales efforts on incoming calls to Pacific Bell on the basis that PB Com will begin its long distance service with zero customers, and it will face entrenched and powerful competitors like AT&T, MCI and Sprint. Joint marketing of its long distance service by Pacific Bell, the witnesses said, is the single most important advantage PB Com has in gaining a foothold in the long distance market.

### **16.1 Discussion**

The evidence in this proceeding shows, beyond peradventure, that PB Com intends to seek maximum leverage of Pacific Bell's monopoly power as the state's primary local exchange carrier in order to acquire new customers for PB Com. The overwhelming majority of telephone customers either must or because of habit will continue to call Pacific Bell first when they want to inquire about their service, add new service, order new features, change their directory listing, or request a change in long distance carriers.

Based on the internal Pacific Telesis documents presented at hearing, it is clear that Telesis, Pacific Bell and PB Com intend that virtually all of these Pacific Bell callers will automatically be the target of aggressive sales efforts on behalf of PB Com, including planned use of callers' proprietary customer information maintained in Pacific Bell files. That is, a Pacific Bell representative will ask callers if their customer records may be reviewed to better serve them, then use their calling patterns to stress advantages of PB Com service.

If completely unchecked, this is the type of activity proscribed by the Costa Bill. Sales efforts of this nature on behalf of PB Com to virtually all Pacific Bell callers, regardless of the reason they are calling, whether or not they have chosen another long distance carrier, and at any point of the conversation, constitute "unfair use of customer contacts generated by the local exchange telephone corporation's provision of local exchange telephone service." (PU Code § 709.2(c)(2).)

The goal of the Costa Bill was to give Californians more choices by opening up the long distance market to LEC's. In this, it is not dissimilar to the 1996 Telecommunications Act that seeks to provide choices for the entire nation. While Pacific Telesis should not be unduly restricted in entering the market through its subsidiary, PB Com, it must refrain from "anticompetitive" behavior and unfair use of

CPNI." Central to this discussion is the notion of what is fair. The long distance carriers have said that "fair" can only equal "same," that is, the only fair use of Pacific Bell's CPNI on behalf of PB Com is that use which gives exactly the same CPNI access to all long distance providers. In contrast, PB Com argued that because long distance companies have their own CPNI, any Pacific Bell use of CPNI is "fair."

Neither approach comports with the plain-face meaning of fair use. Although the long distance carrier position creates a vision of the distribution of a customer's personal information to hundreds of enthusiastic long distance service representatives, in reality, California's constitutional right of privacy would not permit this to happen. The real result of adopting the long distance carriers' position is that Pacific Bell could not use its CPNI on behalf of PB Com at all. PB Com's position of unfettered use of CPNI in marketing by Pacific Bell on its behalf would permit aggressive and informed targeting of customers that no other carrier could match. The choice presented by the LECs and Pacific Bell is every use or no use-- both are too broad. Each company has focused on the question of what is fair for itself. Both have failed to address the question of what is fair for Californians.

Like the long distance carriers' position, the proposal of TURN and the ICG Telecom Group, would condition our approval of the PB Com application upon its arrangement to have Pacific Bell establish a separate group of customer service representatives to perform the joint marketing on behalf of PB Com. That is, Pacific Bell's regular customer service representative would respond to calls as he or she does now, including the equal access disclosure, the processing of change orders and the handling of day-to-day questions. After responding to a caller's inquiry, the service representative would then offer to transfer the caller to another Pacific Bell representative who could describe the long distance service offered by Pacific Bell's affiliate. If necessary to complete the transaction, the customer must repeat all information provided to the first service representative. We find that this proposal is

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<sup>a</sup> PU Code, § 709.2(c).

more restrictive than any the FCC adopted in its Non-Accounting Safeguards Order and, while it is one way of conforming with the state law, is not mandated by the Costa Bill.

Turning to ORA's commentary, we find a more sophisticated and "middle of the road" suggestion that contemplates both telecommunications companies and the customer. The ORA proposal calls for the fashioning of a proper script for inbound calls. The ORA proposal urges development of a sequence of pronouncements that a service representative would be required to make before selling PB Com services to Pacific Bell callers. The pronouncements would inform the customers of their right to select their own long distance carrier via the revolving list, honor the customers' choices by switching the customers to the carriers they express preference for, and explain to inbound callers that Pacific Bell and PB Com are not the same company, but affiliates. We will adopt this scripting approach with guidance from ORA's and TURN's comments because it establishes guidelines that will yield marketing scripts fair to all.

A sequence would promote fairness to customers by:

- \* preventing PacBell from marketing to customers just because they are not current PB Com subscribers, even though the customers have already made up their minds about their long distance provider of choice.
- \* eradicating unnecessary repetition of CPNI by customers as one PacBell representative hands the customer to the PacBell employee who is marketing the PB Com service.
- \* ensuring CPNI use only with permission of customers.
- \* giving all customers similar opportunities to purchase services, i.e. no selective marketing by Pacific Bell for PB Communications based on Pacific Bell's proprietary CPNI.

A sequence would promote fairness to competitors because:

- \* Customers would not be badgered into switching long distance providers if their minds are already made up- in particular, Pacific Bell service

representatives acting as agents of PB Com would not use CPNI to selectively target other companies' customers.

- \* There would be no access by PB Com employees of Pacific Bell's CPNI. ✓
- \* All companies would be able to use their own CPNI in marketing their services.

In addition, we must safeguard against the possibility that the joint marketing plan envisioned by PB Com and Pacific Bell will erode the equal access requirements of the Telecommunications Act and the Costa Bill. The FCC in its Non-Accounting Safeguards order requires on the one hand that Pacific Bell and other Bell operating companies continue to "inform new local exchange customers of their right to select the interLATA carrier of their choice and take the customer's order for the interLATA carrier the customer selects."<sup>2</sup> On the other hand, this obligation is "not incompatible with" the Bell companies' right to market and sell the services of their interLATA affiliates, and "a BOC may market its affiliate's interLATA services to inbound callers, provided that the BOC also informs such customers of their right to select the interLATA carrier of their choice." (FCC Order 96-489, ¶ 292.) Furthermore, the same order provides, "neither the statute nor the legislative history indicates that Congress intended to impose such a requirement [of a separate sales force for joint marketing between a BOC and its affiliate]." (FCC Order 96-489, ¶ 278.)

As TURN points out, the FCC offers no guidance on how to reconcile these business office practices that are in tension. The equal access requirement is an empty formalism if Pacific Bell can satisfy it by simply referring to "many choices," and then describing its affiliate's long distance service in detail. The evidence shows that this is precisely what the Pacific companies intend to do. Based on our reading of the FCC

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<sup>2</sup> FCC Order 96-489, ¶ 292.

order, the FCC did not intend so artful a disregard of a Bell company's equal access obligations.

Therefore, taking into account the above principles of fairness and providing safeguards to ensure the continuation of equal access, a PacBell service representative must:

1. Handle all local service issues first.
2. If the customer would like information on interLATA service, inform customer of right to select interLATA carrier of choice and read seven or eight from the revolving list that PacBell is currently using.
3. After reading from the list, the PacBell service representative may add that he or she is a representative of PB Com.
4. Ask if, upon hearing the disclosure, the customer has already made a choice, would like to continue the list, or would like information on PB Com. If the customer has made a choice, PacBell must honor that choice. In other words, PacBell must:
  - a. switch the customer's service to that carrier.
  - b. give the customer the chosen interLATA provider's phone number
  - c. or, if the customer already has the interLata carrier of his/her choice, PacBell must end the marketing to the customer on behalf of PB Com.
5. Explain what an affiliate is and ask if the customer would like information on PB Com. If asked at any point in the conversation whether PacBell owns PB Com, the representative must answer that PB Com is not the same company as PacBell but is a sister company.
6. Ask the customer if the PacBell service representative may access the customer's CPNI in conjunction with the description of PB Com's services, as required by the 1996 Telecommunications Act.<sup>9</sup> Then the representative may market PB Com services.

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<sup>9</sup> 47 U.S.C. § 222.

We believe that the sequence requirements set forth here fulfill the Costa Bill's aim to produce a fair use of CPNI while not seriously affecting Pacific Bell's ability to market its affiliate's long distance service to callers who express an interest. In particular, we note that the sequence requirement prevents abuse of a customer's CPNI and of PacBell's current monopoly on local distance service.

We have reviewed carefully the Non-Accounting Safeguards and the Accounting Safeguards orders issued by the FCC in Orders 96-489 and 96-490, and we believe that the joint marketing rules we adopt today are in full conformance with the FCC mandates. Indeed, the FCC was careful to point out areas in which states should continue to exercise a role in regulating interLATA affiliates. FCC 96-489 expressly recognizes that (1) the states retain ratemaking authority with respect to intrastate interLATA services (§ 30); (2) the states retain authority to enforce other obligations related to PB Com's provision of intrastate interLATA service (§ 47, fn. 97), such as those that may be imposed as a result of this certification proceeding; and (3) the states retain authority to regulate integrated affiliates (i.e., those that provide both interLATA and intraLATA services) differently from other carriers (§ 317). As the FCC notes, the fundamental objective of the Telecommunications Act "is to bring to consumers of telecommunications services in all markets the full benefits of vigorous competition." (FCC Order 96-489, § 7.) Our order today furthers that objective.

We are aware that the FCC has stated its intention to address CPNI issues in a subsequent order in CC Docket No. 96-115.<sup>4</sup> If that FCC order produces a method of using Pacific Bell CPNI incompatible with the approach we adopted today, the parties may at that time propose different measures for dealing with CPNI use.

We note, finally, that the Telecommunications Act contemplates that, in three years, the requirement that Bell operating companies conduct long distance service through a separate affiliate is to end, unless extended by the FCC. Assuming the

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<sup>4</sup> Id., ¶ 300.